LIAN ANN LORRY TRANSPORT & FORWARDING SDN. BHD. v. GOVINDASAMY

[F.C. (Suffian L.P., Salleh Abas and Abdul Hamid F.JJ.) June 14 & July 1, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No.73 of 1982]

Tort – Negligence – Failure to provide safe system of work – Claim for damages – Defence that employee an insured person within meaning of Employees Social Security Act, 1969 and not entitled to receive damages under the Common law – Whether employee an insured person – Employees Social Security Act, 1969, ss. 2,5,6, & 31.

Labour Law – Employment – Injury to employee – Failure to provide safe system of work – Defence that employee is insured person under Employee Social Security Act 1969 and not entitled to damages at Common law – Employees Social Security Act, 1969, ss. 2,5,6 & 31.

Social Security – Whether person is employee – Whether such person is an insured person – Jurisdiction of Social Security Appeal Board – Whether jurisdiction of civil courts ousted – Employees Social Security Act, 1969, ss. 2,5,6,31,83,84,90 & 91.

Practice and Procedure – Claim that court has no jurisdiction – Not pleaded – Purpose of pleadings – Jurisdiction of civil courts – Federal Constitution, Article 121.

In this case the respondent had suffered severe injuries as a result of an accident sustained while he was unloading bundles of carpets from the appellant's lorry. He sued the appellants for negligence. The learned trial judge agreed with the respondent that the appellants were negligent in failing to provide a safe system of work in unloading the goods from their lorry. In their defence the appellants maintained that the respondent being an insured person within the meaning of section 2 of the Employees Social Security Act, 1939 by virtue of section 31, thereof was not entitled to receive damages under the Common Law. The learned trial judge heard the evidence and the arguments on this issue and came to the conclusion that section 31 of the Act had no application to the case. He awarded damages in favour of the respondent. The appellant appealed. On the appeal it was also submitted that the question as to whether the respondent was an employee within the meaning of the Act ought to be decided by the Social Security Appellate Board and not by a civil court.

Held: (1) the respondent in this case was an employee because a contract of service could be implied from the circumstances of his employment in that he was employed as part of the appellant's business organization and he was not excluded from the definition in section 2 of the Employees Social Security Act, 1969, because there was no evidence to show that as a fact he earned more than $500.00 a month;

(2) although the respondent was an employee, he was not insured at the time of his employment and therefore section 31 of the Employees Social Security Act, 1969, had no application to his case;

(3) the issue of the lack of jurisdiction of the civil courts was never pleaded and the learned trial judge was right in not taking counsel's submission on this issue into consideration as it was made without a basis in that it was not supported by the pleadings. In any event the determination of a preliminary question as to whether or not the respondent was an employee was not only plainly a legal question but also an integral part of the interpretation of section 31 which is legally and constitutionally not within the competence of the Social Security Appellate Board to decide.

Cases referred to:

(1) *Stevenson Jordan and Harrison Ltd.* v. *MacDonald and Evans* [1952] 1 T.L.R. 101, 111.
(2) *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497, 524.
(3) *Farrell* v. *Secretary of State for Defence* [1980] 1 All E.R. 166,173.

FEDERAL COURT.

V. Krishnan for the appellants.
G.T. Rajan for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J.: (delivering the Judgment of the Court): The respondent, a lorry driver, was employed by the appellant on March 20, 1978 at a daily wage of $15.00 per day. Three days later, i.e. on March 23, 1978 whilst he and his lorry attendant, another employee of the appellants, were unloading bundles of carpets from the appellants' lorry No. BAN 171, the bundles sprang and rolled down and fell on the respondent knocking him down. As a result of this accident the respondent suffered serious injuries which rendered him paralysed from the waist downwards.

He sued the appellants for damages on account of negligence. The learned trial judge agreed with him that the appellants were negligent in failing to provide a safe system of work in unloading the goods from their lorry. But in their alternative defence the appellants maintained that the respondent being an "insured person" within the meaning of section 2 of the Employees' Social Security Act, 1969 by virtue of section 31 thereof was not entitled to receive damages under the common law. The learned trial judge heard the evidence and arguments on this issue and after considering them came to the conclusion that section 31 of the Act had no application to the case. Thus he awarded the following damages in favour of the respondent:

(1) $70,000.00 for pain and suffering and loss of amenities with interest at 6% per annum;

(2) $24,570.00 for actual loss of earning for 4 years with interest at 3%;

(3) $4,800.00 for reimbursement of nursing expenses incurred for 48 months with interest at 3%;

(4) $1,200.00 special damages with interest at 3%;

(5) $66,330.00 for loss of future earnings; and

(6) $13,000.00 for future nursing care.

In this appeal before us the appellants only raised the issue of applicability of section 31 of the Act. This section reads as follows:

"31. *An insured person* or his dependants shall not be entitled to receive or recover from the employer of the insured person –

(i) any compensation under the Workmen's Compensation Ordinance, 1952, or

(ii) damages under any other law for the time being in force,

in respect of an *employment injury* sustained as *an employee* under this Act."

[Emphasis added]

Thus in order to deprive the respondent of his entitlement to damages under the common law, the appellants must show that –

(a) the respondent is an insured person; and

(b) the injuries suffered by him is an employment injury sustained by him as an employee.

Condition (b) as regards this appeal is irrelevant because what is in dispute is not the nature of the injuries, i.e. whether employment injury or not, but the question whether the respondent was at the time of the accident an insured person. We now proceed to consider this question.

Under item (11) of section 2 of the Act an insured person is defined as:–

"a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act,"

Thus to be an insured person, two constituent elements have to be proved, namely:–

(i) that the respondent was an employee on the date of the incident; and

(ii) that on that date contributions were payable in respect of him.

The expression "and who is, by reason thereof, entitled to any of the benefits provided by this Act" is not a third element of the definition, but merely a consequence of being an insured person. The Act contemplates that among the consequences of being an insured person are that (a) he is entitled to receive benefits under the Act and that (b) he is debarred from receiving benefits under Workmen's Compensation Ordinance or any other written law for the time being in force.

(a) *Definition of "employee".*

The first constituent element of the definition of "insured person" requires us to determine whether the respondent was at the time of the accident an employee. For this purpose we have to refer to item (5) of section 2 of the Act which defines this term as follows:

"(5) 'employee' means any person who is employed for wages under a contract of service or apprenticeship with an employer, whether the contract is expressed or implied or is oral or in writing, on or in connection with the work of an industry to which this Act applies and –

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the industry, whether such work is done by the employee on the premises of the industry or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the industry or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the industry or which is preliminary to the work carried on in or incidental to the purpose of the industry; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service,

but does not include a person of the descriptions specified in the First Schedule;"

Paragraph (1) of this Schedule describes one such person to be "any person whose wages exceed five hundred dollars a month". This means that such person is excluded from the definition of "employee".

The respondent in this case was employed on a daily rated wage of $15.00 a day and had only served the appellants three days. As a result of the accident which occurred on the fourth day of his employment, he became incapacitated and had to

cease employment. According to the appellants' managing director (DW 1) the respondent was put on a daily rated wage because he was a new employee, and had he been treated as a permanent employee he would have been employed on a fixed monthly wage of $90.00 per month plus commissions based on the tonnage of goods transported by him. The learned trial judge held that because the respondent was employed as a daily paid worker and not as a permanent employee of the appellants he was therefore not employed under a contract of service as envisaged by the Act. In our view, the duration and nature of an employment, be it temporary or permanent, is immaterial for the purpose of determining the existence of a contract of service. As long as there exists a relationship of a master and servant or that of an employer and employee, the law will infer a contract of service existing between them, notwithstanding the fact that the service or the employment is intended by the person in the position of master to be temporary or of a short duration only. And the law will imply the existence of such relationship where a person is hired by another as an integral part of the latter's business. *Stevenson Jordan and Harrison Ltd.* v. *MacDonald and Evans;*[1] *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance.*[2] The circumstances of this case clearly show that there was a contract of service between the appellants and the respondent because the respondent was employed as part of the appellants' transport business; the term of the employment being that the respondent was placed on a temporary basis at a daily wage of $15.00 per day until he would eventually be absorbed into permanent service or otherwise have his employment terminated. Thus clearly the respondent was an employee.

But counsel for the respondent submitted that the respondent was not an employee because he was excluded from the definition as he was earning more than $500.00 a month. The learned trial judge made no finding on what his earning was.

In view of the speculative nature of the evidence, we think that the learned trial judge was correct in not making any finding on this issue, as any such finding would not be factual but hypothetical. It is undeniable that the actual earning of the respondent during those three days of his employment was $35.00. But in his evidence he claimed that over and above his daily wages he was promised commissions of about $250 – $260.00. His wages alone, according to him, at the rate of $15.00 per day, would be $390.00 a month excluding Sundays. He thus claimed that had he not been injured he would have been able to earn at least $610.00 a month. The appellants on the other hand denied that they made any promise to pay commissions to the respondent. According to DW 1, commissions are payable only to a permanent employee, whose wages are fixed at $90.00 per month. In our view, what the respondent could have earned, even if he would be paid commissions, is purely speculative and highly hypothetical. He might or might not have earned more than $500.00 a month had he not met with the accident. For the purpose of the definition of employee the court is not called upon to decide what the hypothetical or even potential earning of a person would be; but what his actual earning was at the time of the accident. In this case there is no material upon which the learned trial judge could make a factual finding that the respondent earned more than $500.00 a month. The evidence adduced clearly shows that the respondent earned less than $500.00 a month, because for the three days during which he worked he was only paid $35.00.

We feel therefore bound to conclude that the respondent was an employee because a contract of service could be implied from the circumstances of his employment in that he was employed as part of the appellants' business organisation and that he was not excluded from the definition because there is no evidence to show that as a fact he earned more than $500.00 a month. A possibility that he might have earned more than this sum is not sufficient to exclude him from the definition. Every positive possibility is always accompanied by a negative possibility.

(b) *Contributions payable.*

Although the respondent is an employee, he is still not an insured person unless the second constituent element of the description is established in that at the time of the accident contributions in respect of him were payable under the Act. This question requires us to study the scheme introduced by the Act.

Section 3 applies the scheme to all industries employing five or more employees. Section 4 requires such industries to be registered with the Social Security Organisation established under Part IV of the Act, whilst section 5 requires all employees of the industries to be insured in the manner provided by the Act. Only after an industry has been registered and its employees have been insured, i.e. registered, would contribut-

ions in respect of the employees be payable under the Act to the Organisation. This is clearly set out in section 6 (1) which is as follows:–

"6. (1) *The contribution payable under this Act in respect of an employee* shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) *and shall be paid to the Organisation.*"

[Emphasis added]

Section 7 repeats that the contributions shall be paid by the employer, even though an employee is employed indirectly by him through an immediate employer; the first mentioned employer being referred to by the Act as the principal employer. And section 9 of the Act requires the principal employer to pay contributions in respect of his employee monthly in respect of the whole or part of each month in which wages are payable to the employee and not otherwise. The time limit when such contributions must be paid is set out by Regulation 32 of Employees' Social Security (General) Regulations, 1971 (P.U.(A) 99/1971). According to this Regulation it must be paid within 30 days of the last day of the month in respect of which the contribution falls due or, in the case of an employee whose employment is terminated, within 15 days of the termination.

It is clear from the provisions of the Act and the Regulations that contributions are payable in respect of an employee only when he and his employer are both registered with the Organisation. In this case although the appellants have been registered since 31.10.1973 the respondent was never registered at all. Before he entered the appellant's employment, he was employed by a previous employer called "Berjaya Forwarding" at Port Kelang, which was also a transportation company. According to DW 2, the Labour Officer attached to the Organisation, Berjaya Forwarding is not an industry within the meaning of the Act. Therefore the respondent was not registered whilst serving his previous employer. Whilst in the service of the appellants, the respondent was also not insured because he was newly employed and was not yet considered for permanent service. The evidence of DW 1, the managing director of the appellants, is very explicit on this. He said:–

"Most of my employees were contributors to SOCSO. That is the permanent ones were. Not the new-comers. If new-comers work with the same idea of permanency then they contribute to SOCSO. If a new-comer comes in he is paid on a daily basis of $15 to $16 a day. If a new-comer is a reliable worker then at the end of the month he would be switched to work on a permanent basis with a fixed salary of $90/– per month plus commission".

On this evidence it is clear that the respondent, being a new-comer, was not treated as being in permanent employment. He was not even considered by the appellants to be a proper employee to be insured under the Act at the material time because he lacked permanency. It would appear that according to the practice of the appellants, it took about three to four months before they decided to give permanency to their employees' service. This is clear from the evidence of the lorry attendant (PW 3) employed by the appellants. This witness said that he began to contribute to SOCSO only 3 to 4 months after he had worked with the appellants.

Further it is also implicit from the evidence of DW 2 that on the date of the accident the respondent was not registered as a contributor and therefore not an insured person. (See his letter P16 dated September 27, 1980). That being the case there could not be at the time of the accident, i.e. 23.3.1978, contributions payable in respect of him to the Organisation. Therefore he was not an insured person and as such could not be deprived by section 31 of the Act of the benefits under the common law.

But counsel for the appellants contended that the respondent was subsequently registered and therefore insured and as such section 31 of the Act is applicable to him.

According to DW 2, he was informed of the injuries to the respondent about 4 days after the accident. He took no action to register the respondent because Form 3 under Regulation 13 of the Employees' Social Security (General) Regulations 1971 (P.U.(A) 99 of 1971) was not submitted. This form was only submitted on 18.9.1980, i.e. about 2½ years later, and on the same date he registered the respondent, although he admitted that at the time of the registration there was no longer any contractual relationship between the parties. In fact DW 1 himself admitted that at the time when he submitted Form 3 the respondent was no longer working for the appellants. Surely the registration of a person, who ceases to be an employee, has no effect at all. Section 5 of the Art requires the registration of all *employees.* It does not apply to the registration of a person who is no longer an employee. Such registration, in our view, is irrelevant and of no consequence and

cannot confer on the respondent the status of an insured person at all.

The major part of the evidence of DW 2 is devoted to the question of the respondent's eligibility to be registered as a SOCSO contributor beginning 21.3.1978 and it is on the basis of this evidence that counsel for the appellants made his submission tc us that the respondent was an insured person. To deal with this submission we wish to point out that under section 31 of the Act, the court is certainly not concerned with the question that the respondent *ought* or *should* be insured but only with the question whether he was *in fact* insured on that date. Section 31 does not deal with an insurable person but with an insured person. Only when an employee is an insured person would he be prohibited from claiming benefits under other law. The respondent might well be an insurable person under the Act at the time of the accident but he was certainly not an insured person. Unless and until he was registered with the Organisation by the submission of Form 3, no contributions in respect of him were payable to the Organisation and that being the case, he was not an insured person. The evidence clearly shows that he was not insured then, and that when he was insured some 2½ years later he was no longer an employee of the appellants. That being the case section 31 of the Act has no application to his case.

(c) *Civil Court's jurisdiction:*

Before we conclude this judgment we must deal with the submission of counsel for the appellants on the second ground of appeal. It was submitted to us that the learned trial judge erred in law in failing to hold that the question as to whether the respondent was an employee within the meaning of the Act ought to be decided by the Social Security Appellate Board and not by a Civil Court.

The Board is established under section 83 of the Act with power to decide a number of matters enumerated in subsections (1) and (2) of section 84. The relevant matters for the purpose of this appeal are those contained in paragraphs (a) and (b) of section 84 (1), namely:—

"(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution; or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act; or"

Subsection (4) of section 84 provides that no Civil Court shall have jurisdiction to decide such matters. This subsection is enacted in the following words:—

"(4) No Civil Court shall have jurisdiction to decide or deal with any question or dispute mentioned in sub-sections (1) and (2) or to adjudicate on any liability which by or under this Act is to be decided by the Board."

However, as the Board in common with other administrative tribunals is not competent to make a final determination on any legal question, its decision is reviewable by the High Court either by way of reference or submission thereto or by way of an appeal. Such review is limited to points of law only. These provisions are to be found in sections 90 and 91 which enact as follows:—

"90. A Board may submit any question of law for the decision of the High Court and if it does so shall decide the question pending before it in accordance with such decision."

"90. (1) Save as expressly provided in this section, no appeal shall lie from an order of the appellate boards set by up or under this Act;

(2) An appeal shall lie to the High Court from an order of an appellate board set up by or under this Act if it involves a substantial question of law;

(3) The period of limitation of an appeal under this section shall be sixty days from the date the order is made."

The effect of the appellants' contention on the second ground of appeal, therefore, is that neither the learned trial judge nor we have the jurisdiction to determine in this appeal the question as to whether the respondent was an employee or not; and that only after the Board has so determined it would the learned trial judge and we either by way of a submission by the Board or by way of an appeal have the necessary jurisdiction to decide the question and that even here we are limited to decide only upon matters involving a substantial question of law.

If this submission is right it means that the learned trial judge should not have decided the question as to whether or not the respondent was an employee at all. Yet the decision on this issue is crucial to the Court's determination on the applicability or otherwise of section 31 of the Act which is part of the appellants' case. Does it mean that the court has also no jurisdiction to decide on the interpretation of this section? Or does it mean that the court, when confronted by the question during the course of determining the applicability or otherwise of section 31 of the Act, must ad-

journ the hearing and refer the question to the Board?

An examination of the records of appeal clearly reveals that such a course of conduct was never taken by the appellants or their counsel. The applicability or otherwise of section 31 has never been part of the respondent's case as his case simply rests on commion law negligence. The appellants at first filed their Statement of Defence by simply denying negligence and it was only in their amended Statement of Defence filed on September 24, 1980 by their present solicitors that an alternative defence under section 31 of the Act was introduced. Paragraph 7A of the Amended Statement of Defence states:–

"7A. Further or in the alternative the Defendants contend that the Plaintiff is an insured person within the provisions of the Employees' Social Security Act 1969 and by virtue of Section 31 of the said Act is not entitled to receive or recover from the Defendant damages under any other law for the time being in force in respect of any employment injury sustained as an employee under the said Act."

Further, there is nothing in the amended Statement of Defence to show that the appellants objected to the jurisdiction of the High Court to determine the issue and in particular the question as to whether or not the respondent was an employee. It was only during the course of making his submission before the learned trial judge that counsel for the appellants raised the issue of jurisdiction by quoting to him sections 84, 90 and 91 of the Act. Such submission prompted counsel for the respondent to state in his reply:–

"Nothing in SOCSO Act to exclude jurisdiction of court in SOCSO matters."

From the review of the records it is clear that the issue of the Civil Court's lack of jurisdiction was never pleaded and that it was raised for the first time only at the last stage of the trial. No application was made by the appellants to amend the defence, nor did they take any action to have the hearing adjourned so that the question on employee could be referred to the Board for its decision. Thus we are of the view that the learned trial judge was right in not taking counsel's submission on this issue into consideration as it was made without a basis in that it was not supported by their own pleadings. In this connection it is relevant for us to quote the speech of Lord Edmund – Davies in *Farrell* v. *Secretary of State for Defence* [3]. Of pleadings his Lordship said:

"For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it."

Quite apart from this technical objection, counsel's submission is also untenable because the issue which the learned trial judge was called upon to decide is really on the interpretation of section 31 of the Act and not on the question of the respondent being an employee within the meaning of the Act, although such question is crucial to the main issue. Section 84 of the Act does not enact that the applicability or otherwise of section 31 lies with the Board. Indeed it will be unconstitutional as it is contrary to Article 121 of the Federal Constitution if the Act were to arrogate the interpretation of this section to the Board. The determination of a preliminary question as to whether or not the respondent was an employee is not only plainly a legal question but also an integral part of the interpretation of section 31 which is legally and constitutionally not within the competence of the Board to decide. Such being the case, we therefore cannot see how the learned trial judge could be held to have erred in deciding the issue.

Thus for the reasons given in the foregoing paragraphs we dismiss this appeal with costs. Deposit to respondent against taxed costs.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; G.T.Rajan & Co.*

HOTEL MALAYA SDN. BERHAD & ANOR v. NATIONAL UNION OF HOTEL, BAR AND RESTAURANT WORKERS & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. and Abdoolcader J.) June 26 & July 5, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 63 of 1982]

Industrial Law – Reference of questions of law to High Court – Whether reference can only be made by court handing down award – Expiry of appointment of Chairman of Industrial Court – Reference of questions of law made by differently constituted court – Whether in breach of natural justice – Industrial Relations Act, 1967, ss. 2, 20, 22, 23, 33 and 33A.

Administrative Law – Certiorari – Award made by Industrial Court – Expiry of appointment of Chairman – Reference of question of law arising from award made by